INDEX

CITATIONS

664409—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 258

CARMEN BEACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (see Pet. 21–24) is reported at 149 F. 2d 837.

JURISDICTION

The judgment of the Court of Appeals was entered June 18, 1945 (Pet. 2). The petition for a writ of certiorari was filed July 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

1. Whether petitioner is entitled to claim that reversible error resulted from allegedly improper remarks made by the prosecutor during his summation to the jury, although concededly the summation was not reported stenographically at the trial and does not appear in the record.

2. Whether the evidence is sufficient to support petitioner's conviction.

3. (a) Whether petitioner is entitled to claim reversible error upon the basis of the judge's charge to the jury, although she did not except to the charge and it does not appear in the bill of exceptions.

(b) Assuming that petitioner is entitled to make such claim, whether the charge was erroneous in the respect claimed.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), commonly known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to

become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on the third count (R. 2) of a four-count indictment charging violations of Section 2 of the Mann Act, *supra* (R. 1–2). The third count charged that on October 13, 1942, she wilfully and knowingly transported one Dorothy Smitley from petitioner's apartment in the District of Columbia to a hotel within the District for the purpose of prostitution (R. 2). Petitioner was sentenced to imprisonment for an indeterminate term of from one to three years and to pay a fine of $2,500 (R. 9). Upon appeal to the Court of Appeals for the District of Columbia, the conviction was reversed (R. 66). The only question considered was whether the Mann Act applies where the transportation occurs solely in the District of Columbia. The majority of the court held that it did not apply in that situation (R. 58–62; 144 F. 2d 533). This Court granted certiorari upon the Government's petition (323 U. S. 705), re-

versed the judgment of the Court of Appeals, and remanded the case to that court for consideration of the other grounds which petitioner had urged for reversal. 324 U. S. 193. The Court of Appeals has now considered those grounds and has affirmed the judgment of conviction (see Pet. 21–24).

The evidence in support of the conviction may be summarized as follows:

Dorothy Smitley testified that early in September 1942, she began to work in petitioner's dress shop in Washington, D. C., and at the same time she commenced living with petitioner in the latter's apartment (R. 11–12). Three days later petitioner suggested to Dorothy that she could earn more money by "selling herself" (R. 12). Although she had never practiced prostitution before (R. 18), she agreed to work for petitioner as a prostitute (R. 12). Petitioner gave her an alias for use in this work, and she immediately began to work as a prostitute, turning over one-half of her earnings to petitioner (R. 12–13, 14–15, 16, 17). From September until November 1942, when she was arrested, she practiced prostitution in petitioner's apartment and in various hotel rooms to which petitioner sent her (R. 19–24). When petitioner directed her to go to a hotel room, she sent her by taxicab and gave her the money for the fare (R. 14–15, 17, 26, 28). Early in November 1942, petitioner took Dorothy from the apartment to the Hamilton Hotel in

Washington where each of them performed acts of prostitution, petitioner receiving the payment (R. 15–16). This transportation was by taxicab and, as was customary, petitioner paid the fare (R. 16).

Petitioner took the stand in her own defense and testified that she never told Dorothy to go to a hotel for the purpose of practicing prostitution, that she never gave her money for cab fares, or received any money from Dorothy, except $4.00 for one week's rent. She admitted that she went with Dorothy to the Hotel Hamilton on the day involved, but did not remember who paid the cab fare. She further testified that the purpose of the visit to the hotel was to see a Mr. Brown who had invited them to the races. However, they did not go to the races. (R. 54–56.)

ARGUMENT

1. Petitioner contends (Pet. 2, 6–8) that reversible error resulted from allegedly improper remarks which she claims were made by the prosecuting attorney during his summation to the jury. This contention is plainly without merit.

Petitioner concedes (Pet. 6) that the summation was not taken down stenographically at the trial. It does not appear either in the bill of exceptions or in the typewritten transcript filed by petitioner (see Pet. 24). It is settled that alleged improper remarks asserted to have been made by government counsel, but which do not appear in the

record, present nothing for review. *Gantz* v. *United States*, 127 F. 2d 498, 504 (C. C. A. 8), certiorari denied, 317 U. S. 625; *Pielch* v. *United States*, 110 F. 2d 817, 822–823 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Paden* v. *United States*, 85 F. 2d 366, 368 (C. C. A. 8); *Hall* v. *United States*, 46 F. 2d 461 (C. C. A. 4); *Saxton* v. *United States*, 33 F. 2d 65, 67 (C. C. A. 8); *Lucking* v. *United States*, 14 F. 2d 881, 883 (C. C. A. 7), certiorari denied *sub nom. O'Neill, etc.* v. *United States*, 273 U. S. 749; *Hale* v. *United States*, 242 Fed. 891, 894 (C. C. A. 8). Nor may petitioner establish that the remarks were made by resort to her affidavit or to newspaper accounts, which are outside the record. Cf. *Morris* v. *United States*, 124 F. 2d 284 (App. D. C.); *Gantz* v. *United States, supra;* Cf. also *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578; *Bono* v. *United States*, 124 F. 2d 724, 725 (C. C. A. 2); *Zell* v. *Bankers' Utilities' Co.*, 77 F. 2d 22, 26 (C. C. A. 9); *Leonard* v. *Field*, 71 F. 2d 483, 487 (C. C. A. 9); *Globe & Rutgers Fire Ins. Co.* v. *Draper*, 66 F. 2d 985, 992 (C. C. A. 9); *Hovland* v. *Smith*, 22 F. 2d 769, 770 (C. C. A. 9). Furthermore, assuming that the prosecutor's remark of which petitioner complains was made and that it was incorporated in the record, it would not avail petitioner, since the summation of defense counsel is absent. Under those circumstances, it is settled that there is no basis for appellate review of the incident. *Vause* v. *United States*, 53 F. 2d 346, 354 (C. C. A. 2),

certiorari denied, 284 U. S. 661; *Murphy* v. *United States*, 39 F. 2d 412, 414 (C. C. A. 8); *Hoffman* v. *United States*, 20 F. 2d 328, 329 (C. C. A. 8); *Silkworth* v. *United States*, 10 F. 2d 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664.

2. There is no merit in petitioner's further contention (Pet. 2, 10–14) that the evidence is insufficient to sustain her conviction.

It does not appear that petitioner moved for a directed verdict at the close of all the evidence (see R. 56). However, passing this defect in petitioner's contention, we think that the evidence was sufficient, as was held by the Court of Appeals, to justify the verdict (see Pet. 24). Petitioner, in arguing this point, endeavors to isolate the testimony relating to the trip to the Hamilton Hotel (pp. 4–5, *supra*). But the record cannot be considered in this narrow aspect. Viewing the record in its entirety, there was ample evidence showing that Dorothy went to work for petitioner as a prostitute; that all arrangements for her work were made by petitioner; that Dorothy went to various hotels at petitioner's direction to practice prostitution; that petitioner paid her cab fares; and that petitioner shared in her earnings. When the Hotel Hamilton incident is considered in this setting, it is plain that there was enough evidence to warrant submission of the issues to the jury. Petitioner's further argument (Pet. 12–14), directed to the credibility of Dorothy's testimony, presents no question for appellate re-

view, since this was a matter for the jury to determine.[1]

3. Finally, petitioner contends (Pet. 2, 14–19) that the trial judge's instruction concerning the testimony of accomplices was confusing and erroneous.

The record discloses that petitioner did not except to the charge of the court (R. 57), and the charge does not appear in the bill of exceptions (see R. 56–57). Under these circumstances, it is plain that the question whether the charge was correct is not open for review. *Wong Tai* v. *United States,* 273 U. S. 77, 83; *Baker* v. *United States,* 115 F. 2d 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Gallagher* v. *United States,* 82 F. 2d 721 (C. C. A. 8); *Goff* v. *United States,* 281 Fed. 822, 823 (C. C. A. 8); *Niebuhr* v. *United*

[1] There is no force in petitioner's assertion (Pet. 9) that there was a material variance between the allegation of count 3 that the offense charged therein occurred on October 13, 1942 (p. 3, *supra*), and the proof showing that the offense occurred early in November 1942 (pp. 4–5, *supra*). Although it is true that where time is of the essence, it must be alleged and established with precision, the general rule is that a variance between the date alleged and the date proved is not material, and proof of the commission of the offense on any date before the return of the indictment and within the period of the statute of limitations is sufficient. *Ledbetter* v. *United States*, 170 U. S. 606, 612; *Weeks* v. *Zerbst*, 85 F. 2d 996, 997 (C. C. A. 10); *Cornett* v. *United States*, 7 F. 2d 531, 532 (C. C. A. 8).

It is clear, also, that the variance in no way affected petitioner's substantial rights, in view of petitioner's admission that she went to the Hamilton Hotel by taxi with Dorothy on only one occasion (R. 54), which, as testified to by Dorothy, was early in November 1942 (R. 15).

States, 278 Fed. 523 (C. C. A. 7); *Hockett* v. *United States,* 265 Fed. 588, 589 (C. C. A. 9), certiorari denied *sub nom Wilson* v. *United States,* 254 U. S. 638.

But, in any event, as was held by the court below (see Pet 22), there is no merit in the contention. The trial court did charge the jury that although the asserted accomplices, including Dorothy Smitley, were not accomplices as a matter of law, their testimony was to be scrutinized "with care, and it is to be received with caution" (see Pet. 14). In this respect, the case is materially different from *Freed* v. *United States,* 266 Fed. 1012 (App. D. C.), relied on by petitioner (Pet. 14–16), for there the trial court refused the defendant's request for an instruction that the testimony of accomplices "ought to be received with suspicion, and with the very greatest care and caution," and charged the jury in the usual manner as to the credibility of witnesses. (266 Fed. at 1014.) Furthermore, it is settled that the victim in a Mann Act prosecution is not an accomplice to her transportation. *Gebardi* v. *United States,* 287 U. S. 112, 121; *United States* v. *Holte,* 236 U. S. 140, 145; *Mackreth* v. *United States,* 103 F. 2d 495, 496 (C. C. A. 5). Finally, the great weight of authority, including Mann Act cases, holds that the giving of an instruction as to the testimony of accomplices is not mandatory, but rests in the discretion of the trial court. *Pine* v. *United States,* 135 F. 2d 353, 355 (C. C. A. 5), certiorari denied, 320 U. S. 740; *Hanks* v. *United*

States, 97 F. 2d 309, 311–312 (C. C. A. 4); *United States* v. *Block,* 88 F. 2d 618, 621 (C. C. A. 2); *Wainer* v. *United States,* 82 F. 2d 305, 307–308 (C. C. A. 7); *United States* v. *Becker,* 62 F. 2d 1007, 1009 (C. C. A. 2); *Rachmil* v. *United States,* 288 Fed. 782, 785 (C. C. A. 2); *Hays* v. *United States,* 231 Fed. 106, 110 (C. C. A. 8), affirmed *sub nom. Caminetti* v. *United States,* 242 U. S. 470, 495.[2] Accordingly, even if the trial court had failed entirely to caution the jury as to accomplice testimony, it cannot be said that the omission would have been fatal. Manifestly, where the court does charge the jury on the question and the defendant by an absence of objection to the charge indicates his satisfaction with it, there is no basis for complaint.

CONCLUSION

The case was correctly decided below, and there is no real conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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[2] The *Pine* and *Hays* cases involved the Mann Act.

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